INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes, regulations and contractual provisions involved	2
Statement	4
1. The facts	5
2. Administrative Proceedings	9
3. Judicial Proceedings	11
Argument	12
Conclusion	17

CITATIONS

Cases:	
United States v. *Binghamton Construction Co.*, 347 U.S. 171	12, 13, 16
Statute and Regulations:	
Davis-Bacon Act, 40 U.S.C. 276a(a)	6, 14
Wunderlich Act, 41 U.S.C. 321–322	15
Armed Services Procurement Regulations, as amended April 29, 1965, 30 Fed. Reg. 5992, § 7.603–26	3
Regulations of the Department of Labor, paragraph 5.6(c)	2, 10
29 C.F.R. Part 7, Section 7.10	2, 16
Miscellaneous:	
Amendments to the Davis-Bacon Act, H.Rep. No. 308, 88th Cong., 1st Sess	16
Dept. of Labor Wage Decision No. R–10,416	6
Reorganization Plan No. 14 of 1950, 15 F.R. 3176	17
Secretary of Labor's General Order 41, dated October 9, 1953	11
Dept. of Labor's Wage Decision No. R–13,689	4, 7
36 Comp. Gen. 806	15
41 Op. A. G. 488	17

207–534—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 900

NELLO L. TEER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 57a–111a),[1] is reported at 348 F. 2d 533.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1965. A timely motion for reconsideration was denied on October 15, 1965. The petition for a writ of certiorari was filed on January 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

[1] "Pet. App." references herein refer to the Appendix to the Petition for Certiorari.

QUESTION PRESENTED

Whether the Court of Claims erred in holding that the Secretary of Labor had made a determination of the minimum wage rates to be paid power equipment operators working on a government construction contract and that the correctness of the Secretary's determination is not subject to judicial review.

STATUTES, REGULATIONS AND CONTRACTUAL PROVISIONS INVOLVED

The statutes, regulations and contractual provisions involved are set forth in the Appendix to the Petition at pp. 112a–117a. In addition, the following Regulations of the Department of Labor and the Department of Defense are pertinent to a resolution of the question here involved.

29 C.F.R. Part 7—PRACTICE BEFORE WAGE APPEALS BOARD provides in pertinent part:

> § 7.10 Review of decisions of the Solicitor other that those in wage determination, debarment, or liquidated damages proceedings.
>
> (a) The Wage Appeals Board may review in its discretion, decisions of the Solicitor relating to controversies concerning the payment of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations which arise under the Davis-Bacon Act and its related acts and the rules published in Parts 1, 3, and 5 of this subtitle, but which do

not arise in proceedings reviewable under §§ 7.8 and 7.9 of this part. The procedures for such review shall be those specified in the remaining paragraphs of this section or any other appropriate procedure upon adequate notice to the interested persons or parties.

(b) Decisions of the Solicitor rendered under § 5.11(b) of this subtitle shall be reviewable in the manner prescribed in § 7.9 of this part.

(c) Interested persons or parties may request review by the Board of any decision of the Solicitor rendered under § 5.5(a)(1)(ii) or § 5.12 of this subtitle which meets the standards prescribed in paragraph (a) of this section. The decisions of the Solicitor shall be reviewable in the manner prescribed in § 7.9 of this part, except that, in addition to the requirements therein stated, the petition for review shall set forth facts showing that the question or questions presented concern the payment of prevailing wage rates or proper classification which involve significant sums of money, large groups of employees, or novel or unusual situations.

The Armed Services Procurement Regulations have been amended as of April 29, 1965, 30 Fed. Reg. 5992, to read as follows:

§ 7.603–26 Disputes concerning labor standards.

Insert the following clause in all contracts subject to the Davis-Bacon Act.

Disputes Concerning Labor Standards

(January 1965)

Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classifications or wage rates contained in the wage determination decision of the Secretary of Labor or the applicability of the labor provisions of the contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor.

STATEMENT

This case arose out of a contract between the United States, acting through the United States Army Corps of Engineers, and petitioner for the construction of the Bear Creek Reservoir on the Lehigh River in Carbon and Luzerne Counties, Pennsylvania. Pursuant to the Davis-Bacon Act, the contract, which was awarded to petitioner on April 26, 1957, required the petitioner to pay its employees at rates not less than those determined by the Secretary of Labor to be prevailing for corresponding classes of laborers in the pertinent locality (Pet. App. 75a, 76a). Petitioner was required to, and did, pay its power equipment operators the wages established by the Secretary of Labor's Wage Decision No. R–13,689 (which was attached to the invitation to bid and a part of the con-

tract) for power equipment operators in "Building and Heavy Construction." Petitioner seeks $163,384.37 in damages for the difference between those wages and the lower wages it would have paid its power equipment operators under a different method of classifying the work they performed.

1. *The facts.* The underlying facts were found by the Court of Claims, and are not directly challenged by the petitioner.[2]

At the time the contract in suit was awarded, two different wage scales were paid power equipment operators in the area in which the contractual work was to be performed. The different wage scales resulted from the different collective bargaining approach of the two unions active in the representation of power equipment operators in that area. Local 542 of the International Operating Engineers, a craft union representing power equipment operators and affiliated with the American Federation of Labor, negotiated a "Building and Heavy Construction" rate and a lower rate for highway construction (Pet. App. 81a, 83a). On the other hand, United Construction Workers, Division of District 50, an affiliate of the United Mine Workers, was an industrial union whose membership included a variety of types of workers in addition to power equipment operators. District 50 did not engage in "Building Construc-

[2] We note, however, that petitioner has relied upon several findings made by a Commissioner of the Court of Claims, which were later rejected by the Court itself. See Pet. 9–10. Compare, Commissioner's Finding 24 (Pet. App. 54a) with the Court's Finding 24 (Pet. App. 103a).

tion", but confined itself to "Heavy Construction and Highway Construction" for which it negotiated rates of pay comparable to the AFL Operating Engineers' lower rates for highway construction (Pet. App. 58a–59a, 81a, 83).

The Davis-Bacon Act, 40 U.S.C. 276a(a) requires government contractors to pay mechanics and laborers wages "computed at * * * rates not less than those stated in the advertised specifications * * *" as having been "determined by the Secretary of Labor to be prevailing * * * on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State * * *."

Prior to issuance of the invitation to bid on the Bear Creek Reservoir project, the Corps of Engineers, in accordance with the Davis-Bacon Act, requested the Department of Labor to make a "determination of the wage rates to be paid laborers and mechanics" on the construction project for the "entire schedule of crafts" (Pet. App. 59a). In response, the Department of Labor issued Wage Decision No. R–10,416 (Pet. App. 104a–107a) which included a specification of wage rates for power equipment operators under each of two classifications: (1) "Building and Heavy Construction" (from approximately $3.06 to $3.81 per hour) and (2) "Highway Construction" (from $2.00 to $2.80 per hour) (Pet. App. 59a, 106a–107a). It did not include rates for power equipment operators under the classification "Heavy and Highway Construction." Wage Decision No. R–10,416, was incorpo-

rated as part of paragraph SC–17 of the Special Conditions of the contract, and attached to the invitation for bids on the contract (Pet. App. 59a, 77a).

On March 6, 1957, the Corps of Engineers requested the Department of Labor to make another wage determination for the project.* The Department of Labor accordingly issued a new wage decision, No. R–13,689 (Pet. App. 108a–111a), which the Corps of Engineers sent to all prospective bidders, including petitioner, as an addendum to the invitation to bid to be substituted for the original determination (Pet. App. 60a, 87a, 108a–111a). The new wage decision listed wage rates for power equipment operators in accordance with the higher scale paid those in "Building and Heavy Construction," and did not include a rate for the power equipment operators engaged in "Highway Construction" or "Heavy and Highway Construction" (*ibid*).

Prior to submitting its bid for the project, petitioner's president and members of its engineering estimating staff made an inspection of the job sites and local conditions including prevailing wages (Pet. App. 61a, 86a). At that time, two dam projects were under

*In the request, the Corps of Engineers erroneously certified to the Department of Labor that no highway work requiring the use of power equipment would be involved; in actuality, 4 per cent of the project was highway-type construction (Pet. App. 60a, 87a). The government has never seriously contested that an error was made in this respect and that the lower rate for highway construction was applicable to some 4 per cent of the work under the contract. Petitioner's claim, however, is not limited to the discrepancy in that 4 percent which, had it been timely presented, could in all likelihood have been settled administratively.

207–534—66——2

way in the area. On the Forest Dam and Reservoir project of the City of Bethlehem Water Authority the power equipment operators were being paid the District 50 rates for "Heavy and Highway Construction." On the other hand, at the Corps of Engineers' Bear Creek project where construction was proceeding on outlet works under a contract awarded in 1956, the power equipment operators were being paid the higher AFL Operating Engineers' rates for "Building and Heavy Construction" (Pet. App. 85a).

Notwithstanding these facts, petitioner decided to proceed upon the assumption that the omission from the addendum to the invitation to bid of a lower wage rate for power equipment operators engaged in heavy or heavy and highway construction was the result of inadvertence rather than a reflection of the AFL Operating Engineer's higher wage rate for both building and heavy construction (Pet. 7). Petitioner prepared and submitted its bid for the contract on the gamble that its assumption was correct; it subsequently appeared that the assumption was not correct and that there had been no omission from the wage decision incorporated in the addendum[4] (Pet. App. 96a–97a). This action is an attempt to recoup the loss of that gamble.

Petitioner's bid was accepted on April 26, 1957. Under the terms of the contract for which the petitioner was the successful bidder, the petitioner agreed

[4] Other than the omission referred to at p. 7, fn. 3, *supra*, affecting only 4 per cent of the work.

to pay its employees rates not less than those set by the Secretary of Labor in the wage determination attached to the invitation to bid (Pet. App. 76a–77a). Petitioner, nevertheless, contracted with District 50 to pay power equipment operators at rates lower than those specified for such workers in the addendum and comparable to those which had been included in the Department of Labor's first wage decision under "Highway Construction" (Pet. App. 61a, 87a).

2. *Administrative Proceedings.* On May 14, 1957, petitioner's representative informed the government's area engineer that petitioner intended to utilize rates and classifications of labor which were not included in the contract. Accordingly, petitioner submitted to the contracting officer a formal request for additional classification and rates under Paragraph SC–17 of the Special Conditions of the contract (Pet. App. 62a, 88a). Paragraph SC–17 provides that any class of workers not covered by the categories of the wage decision shall be classified or reclassified by agreement between the contractor and the class of workers involved with the consent of the contracting officer and that if the interested parties cannot agree the question "shall be referred to the Secretary of Labor for final determination". The contracting officer denied the request by letter dated May 23, 1957, stating that petitioner was, in effect, requesting a reduction in the applicable minimum rates rather than additional classfications. He added that if petitioner believed that the Secretary's determination of

prevailing wage rates was "not in accord with the prevailing area practice, it is suggested that you present the matter to the Secretary of Labor for his decision" (Pet. App. 62a, 88a, 89a).

On May 31, 1957, petitioner replied that its request for a new classification was based on "what we believe was an obvious omission" in the wage decision "which is a part of our contract" (Pet. App. 62a, 89a). The contracting officer rejected this argument, directed petitioner to pay the power equipment operators at the rates listed in the Secretary of Labor's wage decision (Pet. App. 62a, 90a), and invited referral to the Secretary of Labor (Pet. App. 91a).

Contending that this dispute was subject to the general disputes provision of the contract (Pet. App. 115a–116a), and therefore appealable to the Corps of Engineers rather than to the Secretary of Labor, petitioner appealed the decision of the contracting officer to the Chief of Engineers on June 14, 1957 (Pet. App. 63a, 91a–93a). On June 24, 1957, the contracting officer recommended to the Chief of Engineers that "the dispute be processed under the provisions of paragraph SC–17(b) of the contract and paragraph 5.6(c) of [the] Regulations [of the Department of Labor] and final determination as to proper classification and rate be made by the Secretary of Labor rather than the Chief of Engineers" (Pet. App. 93a, 63a). Over petitioner's objection to this recommendation (Pet. App. 63a, 94a–96a), the Office of the Chief of Engineers forwarded the ques-

tion to the Solicitor of Labor (Pet. App. 63a, 96a).[5]

By letter dated August 26, 1957, the Solicitor of Labor concurred in the contracting officer's decision and stated (Pet. App. 96a):

> Wage Determination No. R-13,689 dated March 11, 1957 is the applicable determination for the project and was made a part of the contract between the contractor and the Corps of Engineers for the construction of the project. The rates therein are prevailing in Carbon and Luzerne Counties, Pennsylvania, for the type of construction involved and are currently being paid for work at the same location being performed by another contractor.

Thereafter, petitioner was again directed by the contracting officer to comply with the minimum wage rates contained in the contract and again appealed to the Chief of Engineers (Pet. App. 63a, 97a–99a). On April 17, 1958, the Corps of Engineers Claims and Appeals Board dismissed the appeal on the ground that the Secretary of Labor had sole authority to determine the prevailing wage pattern (Pet. App. 63a, 100a–102a).

3. *Judicial Proceedings.* Petitioner then paid its power equipment operators the wage rates specified in the contract and brought this suit to recover the difference between the contractual minimum and the lower rate it had previously been paying (Pet. App. 64a, 102a).

---

[5] By Secretary of Labor's General Order 41, dated October 9, 1953, the Secretary of Labor delegated his duties under the Davis-Bacon Act to the Solicitor of Labor.

The Court of Claims found, with one judge dissenting, that the Secretary of Labor had made a determination of the rates to be paid to the power equipment operators which was incorporated in the contract and obligatory on petitioner, and that under this Court's decision in *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, the correctness of the Secretary's wage determination was not subject to judicial review.

ARGUMENT

The decision of the Court of Claims is merely an application of this Court's ruling in *United States* v. *Binghamton Construction Co., Inc.*, 347 U.S. 171. The decision is correct, and there is no conflict of decisions and no occasion for further review by this Court.

1. In *United States* v. *Binghamton Construction Co., Inc., supra,* a contractor brought suit in the Court of Claims against the United States to recover the difference between the wage rate as determined by the Secretary of Labor under the Davis-Bacon Act, and the higher wages actually paid as a result of a higher rate established for another government project, which the contractor had to meet in order to obtain the necessary labor. As in the instant case, prior to the institution of the action, the contracting officer and the Chief of Engineers denied the contractor's claim because "[t]here is no authority in law for this office to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions" of the Davis-Bacon Act (347 U.S. at 175 fn. 7). This

Court, in reversing a judgment for the contractor in the Court of Claims, held that the contractor could not recover from the government because the rates included in the contract did not constitute a representation or warranty as to the prevailing rates in the locality. "On its face," the Court said, "the Act is a minimum wage law designed for the benefit of construction workers * * *" (347 U.S. at 178).

> The language of the Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects. Congress sought to accomplish this result by directing the Secretary of Labor to determine, on the basis of prevailing rates in the locality, the appropriate minimum wages for each project. The correctness of the Secretary's determination is not open to attack on judicial review [347 U.S. at 176–177].

Petitioner argues that, even if, under *Binghamton*, the Secretary's determination of wage rates is not subject to judicial review, a different issue is presented where, after the contract has been awarded, it becomes necessary to classify a category of worker omitted from the Secretary's wage decision. But this contention fails to come to grips with the fact that the contracting officer, the Department of Labor and the Court of Claims all found that there had been no omission and that the rates for power equipment operators were prescribed by the wage decision incorporated in the contract (Pet. App. 61a, 88a). Further-

more, Paragraph SC–17(b) of the contract, which petitioner invoked in seeking a classification of the power equipment operators, expressly provides that disagreements with respect to classification shall be referred to the Secretary of Labor.* Under such circumstances, petitioner can hardly object to the referral of the dispute to the Secretary.

Petitioner's attempt to distinguish between the concededly unreviewable wage determination (Pet. 15–16) and the classification of classes of workers is without support in precedent or reason. The Secretary's wage decision inherently requires him to determine the categories of workers to which various rates pertain as well as the rates themselves. Obviously if bricklayers ($3.25 per hour) could be relabeled carpenters ($2.57 per hour), the whole purpose of a determination by the Secretary of Labor under the Davis-Bacon Act would be defeated. The Court of Claims was clearly correct in recognizing that a classification of workers' skills is merely a part of a wage determination and that a wage determination is more than a list of wage rates. As the Comptroller General has noted, in preparing

---

*It is clearly irrelevant that petitioner reached an agreement on the wages for power equipment operators with District 50. The contracting officer withheld his approval of that agreement because it involved the payment of wages lower than those specified in the contract. The Davis-Bacon Act expressly provides that mechanics and laborers shall be paid

> * * * wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics * * *. [40 U.S.C. § 276a(a).]

the determination of the prevailing minimum wages which the Davis-Bacon Act requires the contractor to pay, the Secretary of Labor must specify "the classification of work for which each wage rate is determined to prevail on such projects in the locality, as well as the wage rate itself * * *." 36 Comp. Gen. 806, 807.

2. Petitioner's insistence that it was entitled to review under the disputes clause (Pet. App. 115a–116a) rather than under Paragraph SC–17(b) is clearly without merit. The disputes clause by its terms is applicable "except as otherwise provided in this contract * * *"; Paragraph SC–17(b) unmistakably provides otherwise. Nor would review under the disputes clause by the Corps of Engineers Claims and Appeals Board of the Secretary of Labor's determination make practical sense in the context of the Davis-Bacon Act. As the Board observed in its decision (Pet. App. 101a–102a):

> A decision by this Board would obviously have no binding effect on either the Secretary of Labor or on any contractor other than the present appellant on this very appeal. Yet by its very nature a determination of the proper wages to be paid power operators in Carbon and Luzerne Counties of Pennsylvania, should have a general application to all contractors within an area—in other words, it must literally be "prevailing"—and the responsibility to fix such a prevailing wage pattern is clearly that of the Secretary of Labor.

Similarly, petitioner's invocation of the Wunderlich Act, 41 U.S.C. 321–322, is unwarranted. The Wunderlich Act limits the effect of contractual provision for the finality of the decision of the con-

tracting or other officer. But the finality accorded the Secretary of Labor's wage determinations has its source in the statutory scheme of the Davis-Bacon Act, including its requirement of the incorporation of such determinations in government contracts, rather than in any contractual provision. See *United States* v. *Binghamton Construction Co.*, 347 U.S. 171. Any other reading would undermine the act's function as "a minimum wage law" (*id.* at 178). The legislative history of the act contains no suggestion that Congress intended to authorize or require judicial review of wage determinations made pursuant to the Davis-Bacon Act.[1]

3. Finally, whatever merit there may have been in petitioner's foreboding of widespread administrative abuse under the Davis-Bacon Act (Pet. 17–19) has been largely rendered moot since the Secretary of Labor has, subsequent to the administrative proceedings in this case, created a Wage Appeals Board to review "decisions of the Solicitor relating to controversies concerning the payment of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations which arise under the Davis-Bacon Act." 29 C.F.R. § 7.10 (1965 Rev.). Thus, the administrative procedures on which petitioner seeks re-

[1] Recently, the minority members of the House Committee on Education and Labor proposed the enactment of a provision authorizing judicial review of the Secretary's findings in Davis-Bacon proceedings, H. Rep. No. 308, "Amendments to the Davis-Bacon Act," 88th Cong., 1st Sess., at 29 (1963). The majority made no such recommendation (*ibid.*) and no such legislation was passed.

view have been changed, and the petition presents no question of prospective importance.[8]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

DAVID L. ROSE,
JACK H. WEINER,
Attorneys.

FEBRUARY 1966.

---

[8] Petitioner also relies on an alleged conflict between the Secretary of Labor and the Comptroller General and other contracting agencies of the government. The Attorney General in a letter dated September 24, 1965, to the Secretary of Commerce recognized that by Reorganization Plan No. 14 of 1950, 15 F.R. 3176, the Department of Labor was intended to be "the central agency of the Government for dealing with labor problems" and that the plan "authorized the Secretary of Labor 'to coordinate the administration of legislation relating to wages and hours on federally financed or assisted projects.'" 41 Op. A.G. 488, 491. Moreover, the Armed Service Procurement Regulations were recently amended to prevent future recurrences of the anomalous situation whereby three Armed Service Review Boards permitted review of the Davis-Bacon determination, cited in the Petition at pp. 24–27. The present rules specify that disputes concerning Labor standards with respect to "classifications or wage rates contained in the wage determination decision of the Secretary of Labor" shall be referred to the Secretary of Labor for resolution. 30 Fed. Reg. at 5992 (April 29, 1965).

U.S. GOVERNMENT PRINTING OFFICE: 1966